

DOCUMENT RESUME

ED 342 066

EA 023 600

AUTHOR Schreck, Myron
TITLE The Fourth Amendment in the Public Schools: Issues
for the 1990's and Beyond. Presentation Outline.
PUB DATE 91
NOTE 14p.; Paper presented at the Annual Meeting of the
National Organization on Legal Problems of Education
(37th, Orlando, FL, November 22-24, 1991).
PUB TYPE Legal/Legislative/Regulatory Materials (090) --
Guides - Non-Classroom Use (055) --
Speeches/Conference Papers (150)
EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS Court Litigation; Drug Use Testing; Elementary
Secondary Education; Federal Courts; *Public Schools;
*School Law; *Search and Seizure; *Student Rights
IDENTIFIERS *Fourth Amendment; New Jersey v TLO; Supreme Court

ABSTRACT

In 1985, the United States Supreme Court, in "New Jersey v. T.L.O.," held that the Fourth Amendment applies to searches and seizures conducted by public school administrators. This paper discusses the current state of Fourth Amendment law with regard to public school searches and seizures. Among the subtopics discussed are the following: (1) the nature of reasonable suspicion and reasonable scope; (2) individualized suspicion, including student drug testing, canine sniffing for drugs, and magnetometer searches; (3) desks, lockers, and automobiles; (4) strip searches; (5) police involvement; (6) consent searches and undercover agents; (7) electronic surveillance; and (8) the exclusionary rule. Relevant cases are cited after each subtopic; in addition, the unresolved and controversial legal issues before the courts are discussed. Considering the nature of reasonable suspicion and reasonable scope, courts have generally upheld school searches and seizures: however, courts have invalidated school searches when school officials failed to describe in detail the particular facts of "suspicious behavior." (44 references) (MLF)

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THE FOURTH AMENDMENT IN THE PUBLIC SCHOOLS:

ISSUES FOR THE 1990'S AND BEYOND

PRESENTATION OUTLINE¹

By
Myron Schreck²
 Associate Professor of Law
 University of Idaho College of Law

Presented to
 The 1991 NOLPE Conference

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I. Introduction

American public schools are continuing to encounter an ever-increasing number of problems involving school safety and discipline. The public is demanding that greater efforts be taken to prevent weapons and drugs from entering school buildings and endangering our children. Similarly, the public appears to support greater efforts to discipline unruly students whose conduct interferes with the educational progress of other students. In 1985, the United States Supreme Court, in New Jersey v. T.L.O., held that the Fourth Amendment applies to searches and seizures conducted by public school administrators. Accordingly, public school officials must consider Fourth Amendment law when implementing the various activities deemed necessary and effective to maintain the security of the educational environment. This paper will discuss the current state of Fourth Amendment law with regard to public school searches and seizures. In addition, this paper will discuss the unresolved and controversial legal issues currently before the courts.

II. Current Fourth Amendment Jurisprudence

The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

¹ A complete version of this paper has been prepared for publication. Please contact either the author or NOLPE for information on how to obtain a copy.

² The author teaches and researches Criminal Law and Procedure and Education Law. He is a consultant, mediator and due process hearing officer for the Idaho State Department of Education, Special Education Section, and he is a Member of the Board of Contributing Editors of EDLAW Briefing Papers.

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— Thus the Fourth Amendment contains two discrete clauses: The Reasonableness Clause and the Warrant Clause. The Reasonableness Clause applies to all searches and seizures, whereas the Warrant Clause -- which specifies the requirements for obtaining a constitutionally valid warrant -- applies when prior approval by a judge or magistrate is required. Nevertheless, the two clauses are interrelated. The United States Supreme Court has held that, subject to a few exceptions, warrantless searches and seizures are per se unreasonable. And the Court has said that, subject to a few exceptions, warrantless searches and seizures must be supported by probable cause, which has been defined as the fair probability that contraband or evidence of a crime will be found in a particular location.

The Supreme Court has recognized various exceptions to the "warrant requirement," to the "probable cause requirement," and sometimes to both. Warrants are not required when exigent circumstances demand an immediate search to prevent the loss of evidence, when police are in "hot pursuit" of a suspect, during automobile searches and seizures, and when evidence is in "plain view." Neither a warrant nor probable cause is required for searches incident to lawful, custodial arrest, for "inventory searches" of automobiles and other property impounded by the police, and for various non-criminal administrative searches, including inspections of certain closely regulated businesses and drug testing of certain government employees. The Supreme Court has also held that some searches that do not require a warrant or probable cause must nevertheless be supported by a level of suspicion lower than probable cause, known as "reasonable suspicion." These searches include brief investigative detentions, known as "stop and frisk," employer searches of government employee desks, and public school searches of students and their possessions.

In recent years, the Supreme Court has also clarified the circumstances under which the Fourth Amendment does not apply. Searches that are outside the scope of the Fourth Amendment include "consent searches," electronic surveillance with the consent of one party to the conversation, searches by private citizens, and searches of places and objects as to which a person has no reason to expect privacy. The Court has explained that the Fourth Amendment only applies to government intrusions upon a citizen's "reasonable expectation of privacy," that is, a person's actual expectation of privacy that society is prepared to recognize as reasonable. Accordingly, should a court determine that a person has no reason to expect privacy with respect to an object, then a search or seizure of that object is not governed by the Fourth Amendment.

Violations of Fourth Amendment search and seizure requirements can result in two serious consequences: application of the exclusionary rule and tort liability. The exclusionary rule operates to prevent the admission of illegally seized evidence in criminal trials. The Supreme Court has explained that the exclusionary rule, although not expressly required by the Fourth Amendment, is the only effective way to deter police from violating its constitutional restrictions. The Court has held, however, that the exclusionary rule does not prevent the use of illegally seized evidence for grand jury questioning, in civil tax litigation, and in deportation proceedings. Aside from the issue of exclusion, if school officials violate the Fourth Amendment, they may be held liable under Section 1983 of the Civil Rights Act of 1871 for damages that result from a deprivation of rights protected by the Fourth Amendment. In addition, a school district can be held liable for damages under Section 1983 if the deprivation of constitutional rights was the result of an official governmental policy or custom.

III. The Fourth Amendment rules announced in *New Jersey v. T.L.O.*

In *New Jersey v. T.L.O.*, the Supreme Court held that school officials are government officials, not private citizens, when they conduct searches of their students. However, the Court did not require school officials to obtain warrants because such a requirement would "unduly interfere with the maintenance of the swift and informal disciplinary procedures needed

in the schools." And instead of requiring probable cause to justify a search, the Court accommodated the school's substantial need to maintain order by only requiring reasonable suspicion. To justify the decision to search, there must be "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." Furthermore, the search must be reasonable in its scope and "not excessively intrusive in light of the age and sex of the student and the nature of the infraction."

The Court in T.L.O. expressly refused to decide four important issues that were not raised by the facts of the case: (1) whether a student has a reasonable expectation of privacy in "lockers, desks, or other school property provided for the storage of school supplies," and whether the rules governing searches of these areas are different; (2) what is the "appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies;" (3) "whether individualized suspicion is an essential element of the reasonableness standard" required for school searches; and (4) whether the exclusionary rule is the appropriate remedy for violations of the Fourth Amendment by school officials.

IV. The Nature of Reasonable Suspicion and Reasonable Scope

The Supreme Court in T.L.O. permitted school officials to conduct searches to uncover evidence of school rule violations as well as criminal violations, explaining that schools are permitted to adopt rules that preserve school order and a proper educational environment. Further, once a school prohibits certain conduct, "courts should, as a general matter, defer to that judgment and refrain from attempting to distinguish between rules that are important to the preservation of order in the schools, and rules that are not." The nature of the alleged infraction, however, is a factor in determining the permissible scope of the search. For example, presumably school officials would have greater latitude in searching for drugs or weapons than in searching for cigarettes or overdue library books.

Reasonable suspicion, the T.L.O. Court explained, depends on all the circumstances, merely requires "reason and common sense," and permits a "common-sense conclusio[n] about human behavior" upon which "practical people" -- including government officials -- are entitled to rely." Absolute certainty is not required: "'sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment.'" The Supreme Court further noted that the Fourth Amendment does not require "hairsplitting argumentation" or a "crabbed" application. Although the Court said that states can apply more demanding standards under their own state constitutions, the Fourth Amendment would be violated if school officials merely possessed an "inchoate and unparticularized suspicion or hunch."

After T.L.O., courts have generally upheld school searches and seizures. Of twenty three post-1985 cases that addressed the issue of reasonable suspicion, only three cases held that the school officials lacked reasonable suspicion to search a particular location. In comparison, four decisions in 1984 and 1985 held that school officials lacked reasonable suspicion to search. It is instructive to review several of these decisions and compare them to other cases where, under somewhat similar circumstances, courts had found that reasonable suspicion existed. Essentially, courts have invalidated school searches when school officials failed to describe in detail the particular facts leading them to infer that evidence of misconduct might be uncovered. "Suspicious behavior" should be explained. A search for one type of evidence should not be used as an excuse to search for other evidence when there is no reason to believe the other evidence would be found. School officials must also be careful when relying on informants and hearsay reports, particularly when they are anonymous or when an informant may have an improper motive. Ultimately, however, as noted in T.L.O., some courts might apply a "crabbed notion" of reasonable suspicion and find that school officials had no reason to suspect either a particular student or that particular evidence might be found in a particular location.

1. Cales v. Howell Public Schools, 635 F.Supp. 454, 33 Ed.Law Rep. 172 (E.D.Mich. 1985) (truant student, lied about name, searched for illegal drugs; held, although perhaps some rule or law was violated, no reasonable suspicion that Cales possessed drugs)
2. In re William G., 221 Cal.Rptr. 118, 40 Cal.3d 550, 709 P.2d 1287, 29 Ed.Law Rep. 394 (Cal. 1985) (student tried to hide bulging calculator case and demanded warrant for search; held, no articulable facts--mere curiosity or hunch--no prior knowledge of misconduct, and student entitled to assert right to privacy).
3. Coffman v. State, 782 S.W.2d 249, 58 Ed.Law Rep. 387 (Tex.App.1989) (truant student, tried to hide book bag, became aggressive, admitted returning from parking lot, site of recent thefts; held, reason to suspect some misconduct based on prior incidents and parking lot).
4. Matter of Appeal in Pima County Juvenile Action No. 804841, 733 P.2d 316, 152 Ariz. 431, 37 Ed.Law Rep. 1299 (Ariz.App. 1987) (truant student in school bleachers, site of truancy, smoking and drug use; held, unreasonable to suspect possession of drugs).
5. In re Frederick B., 237 Cal.Rptr. 338, 192 Cal.App.3d 79, 39 Ed.Law Rep. 706 (1987) (students exchanging money in area of prior drug incidents became suspicious because of the reputation of the area for criminal activity; "The possibility of an innocent explanation does not deprive the officer of the capacity to entertain a reasonable suspicion of criminal conduct.")
6. T.A. O'B. v. State, 459 So.2d 1106, 21 Ed.Law Rep. 1078 (Fla.App.1984) (teacher observed students with cigarettes engaging in a "suspicious" "exchange" in off limits area; held, description was insufficient to suspect drug use or to do more than confiscate cigarettes).
7. State v. Brooks, 718 P.2d 837, 43 Wash.App. 560, 32 Ed.Law Rep. 786 (1986) (informant report supported by other reports that suspect frequented drug trafficking site).
8. Commonwealth v. Carey, 554 N.E.2d 1199, 407 Mass. 528, 60 Ed.Law Rep. 920 (1990) (informers reliable because they asserted personal knowledge of suspect possessing gun).
9. Williams v. Ellington, 936 F.2d 881, 68 Ed.Law Rep. 302 (6th Cir. 1991) (informer who reported viewing drug use had no motive to falsely accuse suspects).
10. T.J. v. State, 538 So.2d 1320, 52 Ed.Law Rep. 851 (Fla.App. 1989) (possession of knife suspected, but search of plastic bag that could not hide knife was unreasonable scavenger hunt).
11. In Interest of Dumas, 515 A.2d 984, 357 Pa.Super. 294 (1986) (after finding cigarettes on student, no reason to suspect search of locker would uncover additional evidence).
12. State v. Joseph T., 336 S.E.2d 728, 28 Ed.Law Rep. 1169 (W.Va. 1985) (friend of suspect had consumed beer with suspect that morning; held, reasonable to suspect that suspect had brought alcohol to school and to search suspect's locker).

V. Individualized Suspicion

Individualized suspicion, also known as particularized suspicion, refers to suspicion that a particular individual has engaged in misconduct or may be in possession of contraband or evidence of misconduct. Nonparticularized suspicion, on the other hand, includes situations where misconduct is suspected, but the suspicion is directed at the student population in general or a certain segment of the student population, rather than a specific individual. Schools have engaged in general searches or mass searches of lockers, cars and students, sometimes employing metal detectors, canine sniffing, and urine tests. The Supreme Court in T.L.O. refused to decide whether individualized suspicion is an essential element of the reasonable suspicion requirement. The Court noted that individualized suspicion is generally required for searches, but cases have held that "the Fourth Amendment imposes no irreducible requirement of such suspicion. However, the Court added:

Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where "other safeguards" are available "to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'"

The issue of nonindividualized suspicion can arise in two types of searches: (1) when misconduct has occurred and suspicion is directed toward a group of students, but not an specific individual; and (2) when the school wishes to prevent misconduct by searching students, although there is no suspicion that a particular student has engaged in misconduct.

Sometimes school officials might have good reason to believe that misconduct has occurred, but are unable to connect specific individuals to the misconduct.

Several cases have held that individualized suspicion must be established with respect to each student subjected to search. Depending on the seriousness of harm, and the existence of an emergency, however, a court may be willing to accord school officials greater latitude in searching a group of students.

1. R.J.M. v. State, 456 So.2d 584, 20 Ed.Law Rep. 801 (Fla.App.1984) (student searched merely because female friend had fainted, reportedly because of drugs; held, unreasonable because of absence of individualized suspicion).

2. Webb v. McCullough, 828 F.2d 1151, 41 Ed.Law Rep. 851 (6th Cir. 1987) (principal in charge of 140 students on a field trip to Hawaii, informed of possible violations of alcohol rules, searched student rooms; held, jury could find that search was unreasonable because of absence of individualized suspicion.)

3. In re Alexander B., 270 Cal.Rptr. 342, 220 Cal.App.3d 1572, 60 Ed.Law Rep. 855 (1990) (upon report that someone in group of five or six students possessed a gun, and given the potential danger to students and staff, search of each student in group was reasonable).

Sometimes school officials use general searches to prevent misconduct and deter students from carrying certain items, like drugs or weapons.

4. Kuehn v. Renton School Dist. No. 403, 694 P.2d 1078, 103 Wash.2d 594, 22 Ed.Law Rep. 1297 (1985) (school ordered searches of luggage of students going on field trip; held, general searches were unreasonable because school lacked individual suspicion as to each individual student, regardless of statistical probability that someone was in possession of contraband).

5. Burnham v. West, 681 F.Supp. 1160, 46 Ed.Law Rep. 168 (E.D.Va. 1987) (mass student searches for marijuana, radios, etc., held unreasonable because of absence of individualized suspicion; but result might be different if suspicion could have been narrowed to smaller group, if an exigency existed, or if the misconduct were serious--weapons--and/or prevalent at the school--drug possession). Compare to Alexander B., *supra*.

6. Michigan Dept. of State Police v. Sitz, 110 S.Ct. 2481 (1990) (highway sobriety checkpoint stops reasonable under Fourth Amendment, balancing: (1) state's interest in achieving goal, (2) effectiveness of the search or seizure in achieving goal, and (3) level of intrusion on privacy in light of administrative guidelines that minimized discretion of officers conducting stops).

A. Student Drug Testing

T.L.O. would uphold testing where there is individualized reasonable suspicion and the scope of the test is not excessively intrusive. In the absence of individualized suspicion, mass testing of students are likely to be analyzed under principles set forth in Skinner and Von Raab. two recent Supreme Court decisions that upheld employee drug testing.

1. Skinner v. Railway Labor Executives' Association, 489 U.S. 602 (1989) (blood, breath, and urine tests are intrusions on reasonable expectations of privacy, but reasonableness of testing employees involved in railroad accidents or safety incidents determined by balancing government need to search against degree of intrusion upon privacy, considering that employee privacy was diminished because of physical fitness requirements).

2. National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (suspicionless testing of Customs agents, known to be generally drug-free, upheld because of government interest in preventing bribery and misuse of firearms, and employee privacy diminished because of fitness and character examinations).

3. Odenheim v. Carlstadt-East Rutherford Regional School Dist., 510 A.2d 709, 211 N.J.Super. 54, 33 Ed.Law Rep. 297 (1985) (urine testing all students for drugs and alcohol, as part of annual physical examinations, unreasonably intrusive on privacy and unjustified by number and percentages of students in school with drug or alcohol related problems).

4. Anable v. Ford, 663 F.Supp. 149, 40 Ed.Law Rep. 1175 (W.D.Ark. 1985) (invalidated urine test for marijuana on several grounds, including doubts as to reliability and utility of test--administered days after the alleged incident--and visual monitoring of the act of urination was excessively intrusive).

5. Schail v. Tippecanoe County School Corp., 864 F.2d 1309, 51 Ed.Law Rep. 92 (7th Cir. 1988) (upheld random urine testing of public school athletes because of school's interests in preventing drug-related injuries and assuring that athletes be good role models and because privacy intrusion minimal, in light of other required physical examinations, aural monitoring of urination and relatively minor sanctions of athletic suspension).

— Sitz clarified that nonparticularized administrative searches are not limited to special needs set forth in Skinner and Von Raab. Schools may be able to justify student drug testing by satisfying the three prongs of the balancing test in Sitz. As to governmental interest, schools should present evidence of the serious harm that could result from student drug and alcohol use, including the likelihood of drug dealing and introduction of weapons on campus. As to effectiveness, schools may be required to establish a prevalent drug problem on the particular campus as well as the inability to uncover drug use through other methods. Even in light of Von Raab, courts might be reluctant to allow the testing of students who are largely drug free, solely for the purpose of deterring future use of drugs, particularly in light of the fact that students are generally closely scrutinized by teachers on a regular basis. Finally, as to privacy, schools should adopt test guidelines that minimize intrusion on student privacy, for example, with prior notice of testing procedures, aural monitoring of urination, and minor sanctions for positive results (such as, refusal to send test samples to criminal prosecutors). Courts may require proof that students have diminished privacy, as was shown in Von Raab and Skinner, although such proof was not required to sustain brief sobriety stops in Sitz.

B. Canine Sniffing for Drugs

Using dogs to sniff for drugs on campus raises several issues. First, did a search occur, i.e., was there an intrusion on a student's reasonable expectation of privacy? In deciding this issue, courts might distinguish between detaining and not detaining persons or property, between sniffing persons and sniffing personal property, and between sniffing persons in close proximity or at a distance. Second, if the canine sniffing procedure is a search, was it reasonable? In deciding this issue, courts will distinguish between searches based on individual suspicion and mass searches where individual suspicion is absent. Mass searches will probably be analyzed under the balancing tests used in Skinner, Von Raab, and Sitz, and schools should be prepared to present evidence of the seriousness of a drug problem and the likelihood of the canine-sniffing program to detect the presence of drugs or at least deter its presence on campus.

1. United States v. Place, 462 U.S. 696 (1983) (dog-sniffs of personal property are so limited that they are not searches under the Fourth Amendment, but 90 minute detention of luggage constituted an unreasonable seizure).
2. Doe v. Renfrow, 475 F. Supp. 1012 (N.D. Ind. 1979, aff'd in part and remanded in part, 631 F.2d 91 (7th Cir. 1980), cert. denied, 451 U.S. 1022 (1981) (canine sniffing of students not a search under the Fourth Amendment).
3. Jones v. Latexo Independent School Dist., 499 F.Supp. 223 (E.D. Tex. 1980) (use of marijuana sniffing dogs was unconstitutional particularly because the searches lacked individualized suspicion; but sniff by school officials might not be a search).
4. Horton v. Goose Creek Independent School Dist., 677 F.2d 471 (5th Cir. 1982), cert. denied, 463 U.S. 1207 (1983) (using dogs to sniff the entire student body, in the absence of individualized suspicion, violated the Fourth Amendment, but court held that canine sniffing of lockers and cars was constitutional because they were inanimate objects located in public as to which the students' expectations of privacy were minimal, and court declined to decide whether using a dog to sniff people at some distance would be a search).
5. Burnham v. West, 681 F.Supp. 1160, 46 Ed.Law Rep. 168 (E.D.Va. 1987) (teacher sniffing of student's hands was not a search because students have no reasonable expectation of privacy in the air surrounding their persons, relying on Doe v. Renfrow and Jones).

C. Magnetometer Searches

The use of metal detectors to uncover weapons have been upheld to screen passengers at airports -- United States v. Albarado, 495 F.2d 799 (2d Cir. 1974; United States v. Davis, 482 F.2d 893 (9th Cir. 1973) -- and to screen persons entering a state courthouse -- McMorris v. Alioto, 567 F.2d 897 (9th Cir. 1978). Generally, persons subjected to these searches were permitted to avoid the procedures by deciding not to either board the aircraft or enter the courthouse. The magnetometer searches were limited in that they only detected metal, all persons entering the protected areas were required to submit to the search, and containers could be searched only if they might reasonably conceal a weapon.

Magnetometer searches of students will probably be analyzed under the balancing tests used in Skinner, Von Raab, and Sitz. First, a school district should present evidence of a prevalent problem of weapons possession among students and the probability that weapons might be brought into the school building. Second, minimally intrusive procedures should be applied, such as permitting students to empty pockets before trying to enter again and using pat-downs as a last resort. On the other hand, magnetometer searches of students are critically different from airport magnetometer searches in that students are legally required to attend school, while travellers can chose to travel by a means other than airplane.

VI. Desks, Lockers and Automobiles

In T.L.O., the Supreme Court refused to decide whether a student has a reasonable expectation of privacy in "lockers, desks, or other school property provided for the storage of school supplies." The Court noted that generally students must bring to school items of personal hygiene and are likely to carry personal items, such as letters, photographs and diaries.

One theory that a school can assert is that students have no reason to expect privacy because lockers and desks are owned by the school and subject to school inspection. Another theory is that, although students may expect privacy from the scrutiny of others, the school administration that has access to the lockers and desks has the power to consent to the search of these places.

A. Student Lockers

1. Commonwealth v. Carey, 554 N.E.2d 1199, 407 Mass. 528. 60 Ed.Law Rep. 920 (1990) (issue of privacy would depend on whether the school has a policy making lockers subject to search by the school officials because, if students are notified of policy in advance, they can limit intrusion by not keeping personal or intimate items in their lockers).

2. In Interest of Dumas, 515 A.2d 984, 357 Pa.Super. 294 (1986) (students have reasonable expectation of privacy as to their school lockers; concurring justices stressed that record did not indicate that the school had placed special restrictions on the use of lockers or notified students that lockers would be subject to random or periodic inspections.)

3. State v. Joseph T., 336 S.E.2d 728, 28 Ed.Law Rep. 1169 (W.Va. 1985) (locker privacy upheld in light of West Virginia Board of Education handbook provision that students "may reasonably expect that their lockers will not be searched unless appropriate school officials consider a search absolutely necessary to maintain the integrity of the school environment and to protect other students.")
4. S.C. v. State, 583 So.2d 188, 68 Ed.Law Rep. 1201 (Miss. 1991) (students have a reasonable expectation of privacy in their school lockers under the Mississippi Constitution).
5. State v. Michael G., 748 P.2d 17, 106 N.M. 644, 44 Ed.Law Rep. 743 (N.M.App. 1987) (state conceded that the T.L.O. reasonable suspicion standard applies to locker searches).

Several courts have applied the reasonable suspicion standard to locker searches without discussion. See, e.g., Williams v. Ellington, 936 F.2d 881 (6th Cir. 1991); Coronado v. State, 806 S.W.2d 302 (Tex.App. Texarkana 1991); State v. Brooks, 718 P.2d 837, 43 Wash.App. 560 (1986); R.D.L. v. State, 499 So.2d 31 (Fla.App. 2 Dist. 1986).

B. Student Automobiles

Searches of student automobiles have also been supported under the reasonable suspicion standard, but the automobiles were located on school grounds. E.g., Coronado v. State, 806 S.W.2d 302 (Tex.App.1991). One might argue that school officials have no authority to search automobiles parked off of school grounds or that such a search would have to be conducted upon proof of probable cause instead of reasonable suspicion. But this issue, as well as a definition of "school grounds" has not been addressed by the courts yet.

1. Shamberg v. State, 762 P.2d 488, 49 Ed.Law Rep. 964 (Alaska App. 1988) (search of a car parked on school grounds upheld, noting that T.L.O. recognized the school's substantial interest "in maintaining discipline in the classroom and on school grounds.")
2. People in Interest of P.E.A., 754 P.2d 382, 46 Ed.Law Rep. 1027 (Colo. 1988) (informed by a police officer that two minors might have marijuana for sale at school, and after searching minors and their lockers, but not finding marijuana, school searched student who had driven one of the minors to school and parked car on school grounds; held, reasonable because the car "provided the means for transporting the marijuana to the school and for concealing the contraband.")
3. State v. Slattery, 787 P.2d 932, 56 Wash.App. 820, 58 Ed.Law Rep. 1345 (1990) (because of report that student was selling marijuana in the parking lot, and fact that search of student uncovered \$230 in small bills and a piece of paper with a telephone pager number on it, and search of car uncovered a pager and a notebook containing names with dollar amounts written next to the names, school officials opened the car trunk, searched lock briefcase, and discovered marijuana; held, reasonable in light of fact that the informant had been reliable in the past, student was carrying a large sum of money in small bills and a pager, drug use "was a serious, ongoing problem at the school," school officials had to act immediately before Slattery or a friend could have removed the car from school grounds, and T.L.O. not limited to just personal and locker searches).

VII. Strip Searches

Courts have applied the reasonable suspicion requirement to searches that have involved the limited removal of shoes and socks and other clothing not considered sensitively private. But courts have uniformly invalidated searches where students were required to strip to nudity or to their underwear. In Wynn v. Board of Educ. of Vestavia Hills, 508 So.2d 1170 (Ala. 1987), two fifth grade students were suspected of taking six dollars that the class had accumulated to use on a class project. The plaintiff alleged that the teacher had told the other students in the class to look in her books, that the students looked in her purse, and that she and the other student were told to come to the front of the class and remove their shoes so that the teacher could feel their socks. The court held that there was reasonable grounds to suspect the plaintiff because they were the only ones in the classroom when the money was taken. "Given the classroom setting and the concern of the students .. , we conclude that the very limited search that occurred was not excessively intrusive and was reasonably related to the objective of the search." One judge dissented, however, arguing that summary judgment was inappropriate in light of the allegations that the other students had conducted the search, the suspects were required to remove their shoes and be searched in front of the class, and this misconduct only involved the loss of six dollars.

T.L.O. does not expressly prohibit strip searches and only requires that the scope of searches be reasonable in light of the age and sex of the student and the nature of the alleged misconduct. Considering the fact that drugs may be hidden on a student's body in a manner that might not be detected by a pat-down, it may not be unreasonable to an immediate search of undergarments to prevent the loss of such evidence. The nature of the infraction may be an important factor. Perhaps strip searches for dangerous weapons are more likely to be upheld than strip searches for drugs or other evidence of misconduct.

VIII. Police Involvement

The Supreme Court in T.L.O. did not discuss the appropriate standard for searches conducted by school officials "in conjunction with or at the behest of law enforcement agencies." Several courts have addressed this issue under some unusual circumstances.

1. F.P. v. State, 528 So.2d 1253 (Fla.App. 1988) (even if school resource officer's "dual role as a school official and a law enforcement officer were not considered, the fact that she acted at the behest of a police officer" meant that the school search exception and the search must be supported by probable cause, not just reasonable suspicion).
2. Cason v. Cook, 810 F.2d 188, 37 Ed.Law Rep. 473 (8th Cir. 1987), cert. denied, 482 U.S. 930 (1987) (reasonable suspicion standard applied although police liaison officer was involved in the search because search was not at the behest of a law enforcement agency and liaison officer's involvement was limited to a pat-down search after evidence was found).
3. Martens v. District No. 220, 620 F.Supp. 29 (N.D.Ill. 1985) (deputy sheriff at school on another matter searched student; held, reasonable suspicion applies because imposing the warrant and probable cause requirements would not serve the interests the school in preserving swift and informal disciplinary procedures and deputy exercised a limited role, had not developed the facts of the investigation, and had not required that the student be detained and searched).
4. Coronado v. State, 806 S.W.2d 302, 66 Ed.Law Rep. 1347 (Tex.App.1991) (reasonable suspicion standard applies "when school officials conduct the search in question in conjunction with, but not at the behest of, police officers who are assigned to the school.")

5. People in Interest of P.E.A., 754 P.2d 382, 46 Ed.Law Rep. 1027 (Colo. 1988) (police officer informed assistant principal that informant reported two minor students planning to sell marijuana at school; held, school officials were not police agents because the police officer did not request the searches, did not participate in the searches, and had no knowledge of the investigation; "supplying information to the principal with the intent of initiating the search and his presence on school premises during the investigation" did not establish that the school officials were police agents). Compare to F.P. v. State, *supra*.

IX. Consent Searches and Undercover Agents

A student's consent to a search operates to waive the student's rights under the Fourth Amendment. Consent must be voluntary. In obtaining consent, however, a school official need not warn the student of his or her right to refuse consent.

1. In re Corey L., 250 Cal.Rptr. 359, 203 Cal.App.3d 1020 (1988) (after being informed that suspect possessed cocaine on campus, principal confronted suspect, who denied the allegation but raised his hands and said, "You can search me if you want to;" held, principal was not required to inform suspect of right to remain silent prior to obtaining consent to search, and the consent was valid, as it was volunteered without even a request for permission to search).

2. Coronado v. State, 806 S.W.2d 302, 66 Ed.Law Rep. 1347 (Tex.App.1991) (assistant principal had reasonable suspicion to detain and search student, and, after car keys were uncovered, student volunteered to take principal to car and consented to car search).

3. R.J.M. v. State, 456 So.2d 584, 20 Ed.Law Rep. 801 (Fla.App.1984) (suspect turned over knife during search that was not based on reasonable suspicion' held, production of weapon during unlawful search is a product of and tainted by that search rather than a voluntary surrender or abandonment).

In several cases, the Supreme Court has approved the use of undercover agents, even those concealing wire recorders, on the theory that the targets of investigation had assumed the risk of trusting the undercover agents. E.g., Osborn v. United States, 385 U.S. 323 (1966); Lewis v. United States, 385 U.S. 206 (1966); Lopez v. United States, 373 U.S. 427 (1963). In addition, the Court has held that the Fourth Amendment is not violated with the government overhears a conversation with consent of one party to the conversation. United States v. White, 401 U.S. 745 (1971) (listening by means of a radio transmitter); Rathbun v. United States, 355 U.S. 107 (1957) (listening over an extension phone).

X. Electronic Surveillance

Electronic surveillance implicates the Fourth Amendment if it intrudes upon the suspect's reasonable expectation of privacy. Katz v. United States, 389 U.S. 347 (1967). The use of miniature radio transmitters (beepers) to monitor the location and movement of automobiles and other property is not a search, and does not implicate the Fourth Amendment, if it is used to monitor activity otherwise available to public view. United States v. Knotts, 460 U.S. 276 (1983). However, the use of beepers to monitor a private residence, a location not open to visual surveillance by the public, is a search under the Fourth Amendment. United States v. Karo, 468 U.S. 705 (1984). The Court noted that, although the use of a beeper is less intrusive than a full-scale search, it allowed the government to obtain information that could not be obtained without a warrant.

Schools might be permitted to employ electronic surveillance devices to monitor the publicly visual conduct of students, e.g., television cameras in school hallways, on the theory that the Fourth Amendment is not implicated because there has been no intrusion upon students' privacy expectations. Similarly, a school might be permitted to employ a surveillance device in an area of the school off limits to students on the theory that students have no reason to expect privacy in such areas. Electronic surveillance of areas where students have reason to expect privacy must satisfy Fourth Amendment requirements. But, applying T.L.O., perhaps a school need not obtain a warrant or establish probable cause; reasonable suspicion might suffice. Such electronic surveillance of all students, however, would be considered a general, nonparticularized search, such as mass drug testing and magnetometer searches. In addition, a practical consequence of using electronic surveillance devices is that the school environment may tend to resemble a prison. Cf. In re Arias, 42 Cal. 3d 667; 725 P.2d 664; 203 Cal. Rptr. 505; 230 Cal. Rptr. 505 (1986) (use of electronic listening device in chapel of youth authority school violated state statute on eavesdropping).

XI. Exclusionary Rule

The Supreme Court in T.L.O. refused to decide whether the exclusionary rule is the appropriate remedy for violations of the Fourth Amendment by school officials. The Supreme Court of California addressed this issue in In re William G., 221 Cal. Rptr. 118, 40 Cal.3d 550, 709 P.2d 1287 (Cal. 1985). After determining that evidence was seized from the student in violation of both the Fourth Amendment and the California Constitution, the court determined that the exclusionary rule is the only appropriate remedy when evidence is sought to be admitted in a juvenile or criminal prosecution. The court explained:

...The exclusionary rule is intended not only to have a deterrent effect on police misconduct, but to preserve the integrity of the judicial system. "When, as in the present case, the very purpose of an illegal search and seizure is to get evidence to introduce at a trial, the success of the lawless venture depends entirely on the court's lending its aid by allowing the evidence to be introduced. It is no answer to say that a distinction should be drawn between the government acting as law enforcer and the gatherer of evidence and the government acting as judge." Id., quoting from People v. Cahan, 44 Cal.2d 434, 445, 282 P.2d 905 (1955).

Several courts have applied the exclusionary remedy in juvenile and criminal proceedings without discussing the appropriateness of the remedy. See, e.g., T.J. v. State, 538 So.2d 1320 (Fla.App. 2 Dist. 1989); Matter of Appeal in Pima County Juvenile Action No. 804841, 733 P.2d 316, 152 Ariz. 431 (Ariz.App. 1987); In Interest of Dumas, 515 A.2d 984, 357 Pa.Super. 294 (1986). On the other hand, prior to the decision in T.L.O., some courts had said that the exclusionary rule does not apply when evidence is seized by school officials. See, e.g., Bellnier v. Lund, 438 F. Supp. 47 (N.D.N.Y. 1977); United States v. Coles, 302 F. Supp. 99 (N.D. Me. 1969). For example, in State v. Young, 234 Ga. 488, 216 S.E.2d 586 (1975), the Georgia Supreme Court held that exclusionary rule applied only to unconstitutional searches conducted by law enforcement officials and did not apply to the seizure of marijuana from a student by an assistant principal.

After T.L.O., it may not be valid to argue that the exclusionary remedy should not apply to searches by government officials who are not law enforcement officers. T.L.O. expressly held that public school officials are government officers for the purposes of the Fourth Amendment. The Supreme Court has, however, permitted the use of illegally seized evidence for grand jury questioning, in civil tax litigation, and in deportation proceedings by using a balancing test for determining if the deterrence value of applying the exclusionary rule outweighs the social costs and administrative disruption. For example, in the deportation

proceedings case, the Supreme Court found, among other things, that the Immigration and Naturalization Service has its own scheme for deterring Fourth Amendment violations by its agents, that it is unlikely that the exclusionary rule would deter INS agents, and that applying the exclusionary rule "in proceedings that are intended not to punish past transgressions but to prevent their continuance or renewal would require the courts to close their eyes to ongoing violations of the law." Immigration and Naturalization Service v. Lopez-Mendoza, 468 U.S. 1032 (1984).

Perhaps the following analysis might assist prosecutors who wish to argue that, when school officials have seized evidence unconstitutionally, the exclusionary rule should not apply because the deterrence of the exclusionary rule would be minimal and the social costs too great. School officials are more likely to be deterred by the imposition of civil liability than by application of the exclusionary rule in subsequent criminal or juvenile proceedings, in which they are rarely involved. Indeed, because of the pressure to protect other students from the threat of drugs and weapons, school officials are not likely to be deterred by the exclusionary rule and more likely to engage in a search to dispel their fear that students are in possession of such harmful items. Furthermore, the social costs of applying the exclusionary rule are great because permitting students to avoid the consequences of their misconduct would undermine respect for the law, would interfere with the relationship between teachers and students, and would perhaps encourage others to engage in misconduct. Justice Powell, while concurring with the majority in T.L.O., stressed the fact that, unlike law enforcement officers, who are responsible for investigating criminal activity, teachers and students have a commonality of interests with their students. Instead of being in an adversarial relationship with students, teachers are typically responsible for the welfare of their students. Thus, it would be unreasonable to apply "the full panoply of constitutional rights" with the same force and effect in schools as in the enforcement of criminal laws.

XII. Conclusion

Because of the importance of assuring a safe school environment as well as proper student discipline, school officials will continue to employ the necessary means to detect, as well as to deter misconduct. The initial question in Fourth Amendment jurisprudence is whether student reasonable privacy expectations were intruded upon. In some cases, the use of drug-sniffing dogs, electronic surveillance, undercover agents, locker searches and consent searches will not implicate the Fourth Amendment. When the Fourth Amendment has applied, schools have rarely been unable to establish the existence of reasonable suspicion to search, even to the extent of searching student automobiles parked on school grounds. General or mass searches of students, where individualized suspicion of misconduct is absent, as in drug testing and magnetometer searches, still present problems for courts and must be analyzed in accordance with recent Supreme Court decisions establishing the balancing test for such searches. Finally, although no recent court has refused to apply the exclusionary remedy when evidence has been seized illegally by school officials, courts have generally refused to apply a higher standard than reasonable suspicion when police are involved in school searches, as long as police have not requested school officials to conduct searches. The availability of new technology for surveillance will present new Fourth Amendment problems and perhaps new legal doctrine. In the meantime, however, the Supreme Court's decision in T.L.O. has provided school officials with considerable discretion in detaining and searching students in order to maintain order and safety in the educational environment.